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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-450.

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania,

and

JOSE DIAZ and ENILDA DIAZ, His Wife, WILLIAM ZIMMERSPITZ and NANCY ZIMMERSPITZ, His Wife, F. CARL KRETZMANN and KATHERYN L. KRETZMANN, His Wife, ARTHUR HARVEY and MURIEL HARVEY, His Wife, DANIEL P. X. POWELL and ANNA T. POWELL, His Wife, SETH W. WATSON, JR., and ANNE P. WATSON, His Wife, and HENRY E. CROUTER,

Appellants,

v.

ALTON J. LEMON, NEAL F. BRACKEN, and BENJAMIN S. LOWENSTEIN,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

REPLY BRIEF OF APPELLANTS JOSE DIAZ AND ENILDA DIAZ, HIS WIFE, WILLIAM ZIMMERSPITZ AND NANCY ZIMMERSPITZ, HIS WIFE, F. CARL KRETZMANN AND KATHERYN L. KRETZMANN, HIS WIFE, ARTHUR HARVEY AND MURIEL HARVEY, HIS WIFE, DANIEL F. X. POWELL AND ANNA T. POWELL, HIS WIFE, SETH W. WATSON, JR., AND ANNE P. WATSON, HIS WIFE.

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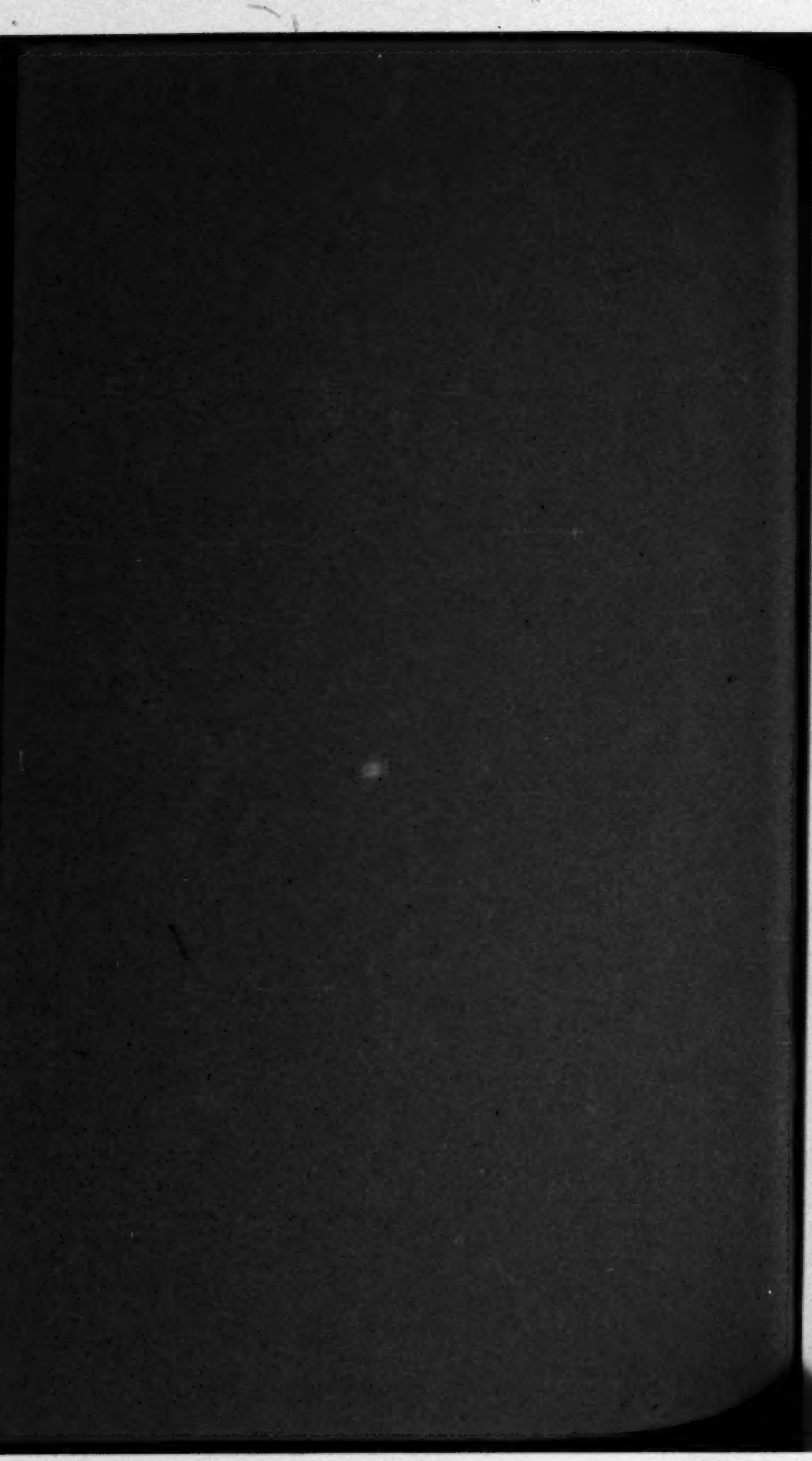

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ARGUMENT.

The Summary of Argument, at page 4 of Appellees' Brief, states their whole case. That case boils down to but two points:

1. The Act "helps parents advance religion".
2. The Act "fosters political entanglement and divisiveness".

Everything else in the Brief is an attempt to argue these two points.[1]

I. The First Point: "Helping Parents Advance Religion".

The Appellees' statement that "the Act was passed *before* the school year started", thus supposedly creating a "statutory promise" which "encouraged parents to enroll their children in non-public schools" (Brief 15) is grossly inaccurate and misleading. The Act was signed into law August 27, 1971—a few days before the school year started. Application forms for parents were issued long after that, the first forms requiring filing only on July 15, 1972 (A 86). It was incumbent upon all counsel to know these were issued only on May 15, 1972, *after* the school year was practically over. The whole "statutory promise" argument vanishes. Not even the Court below—zealous as it was to condemn the Act—ventured the remarkable notion of the "statutory promise".

Just as the Appellees have, by the foregoing, misrepresented the facts of this case, so have they transparently attempted to obscure the issues by polemic references to past religious history and by a long list of cases that are clearly not in point. They have utterly failed to meet our arguments.

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1. The second and third Questions Presented by Appellees are not properly before the Court. The Order of the Court below, respecting these questions, was final (A 64). They were not raised by a cross appeal.

II. The Second Point: "Divisiveness".

The Appellees blow up out of all proportion this Court's remarks in *Lemon I,* regarding "political divisiveness". Those remarks must be read as confined to the facts there presented, namely, entanglement of government with religious *institutions.* They did not concern government and citizen welfare. The lower Court made no findings of "political divisiveness" and, indeed, made no reference to the matter.

The doctrine which Appellees seek to establish would not only be subversive of fundamental liberties, but would also fly in the face of constitutional tradition and precedents long insisted upon by this Court. It has never been constitutional doctrine to deny any group of citizens the rights of petition, franchise, speech, press and assembly, irrespective of how distasteful their views might be to other groups. See, *e.g., Cantwell v. Connecticut,* 310 U. S. 296 (1940). It has never been constitutional doctrine to suppress civil liberty at the vital point of its exercise by labelling it "politically divisive". Yet, Appellees would, in essence, have this Court promulgate this constitutionally subversive directive to the parents now before it:

> "Since you have dared to exercise your political liberty, and since some religious groups do not like what you have advocated, the legislation which you support must, *on that account,* be struck down as contrary to the Constitution."

Such an argument is a contrivance of the moment, never invoked until the recent appeals of Catholic citizens (united with a substantial number of Protestants and Orthodox Jews) seeking equity from their government. Such an argument, masked as constitutional probity, is at bottom, constitutionally malevolent.

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Absent the gloss of religious bias, no one would seriously contend that public assistance to disadvantaged Blacks should be outlawed because some groups choose to create political controversy along *racial* lines. Nor, we dare say, would Appellees carry their thesis forward to attack the commendable and humane federal Resettlement Act (P. L. 92-352, July 13, 1972) which authorizes the payment of $85 million of taxpayer funds, plus an appropriation of $50 million (P. L. 95-571, Oct. 26, 1972) to the State of Israel (a) to afford individual aid to refugees from *religious* discrimination in Russia, and (b) to assist the public ends of the state through the in-gathering of Jews. There are no restrictions in the Resettlement Act to prevent the use of the funds for religious, educational and other purposes useful to a state which is pervaded by an official and preferred religious establishment. Examples involving other religious establishments could be multiplied at length.[2] The doublethink constitutionalism advanced by Appellees promises divisiveness and menaces freedom in pluralistic America.

Aside from the grotesque suppression of constitutional liberty espoused by Appellees, the situation in Pennsylvania does not proximate the caricature presented by them. As our main brief points out, the challenged statute was passed by a vote of 132 to 63 in the State House and 32 to 12 in the State Senate. Instead of pointing out these votes and that they were cast on both sides of the aisle by members of all faiths, Appellees chose to avoid their burden of proving the alleged political divisiveness by seeking trial. Indeed they repeatedly made public appeals, labelling the issue as "Catholic" in a state wherein Catholics comprise 22% of the total population. Despite their self-

2. For a description of lobbying efforts and organized political pressure by religious groups, see *The New York Times,* April 6, 1973, p. 14.

serving complaints, the limited group of Appellees have no record either before this Court, or in the history of the legislation at bar, which can remotely suggest any serious political divisiveness concerning the passage and administration of the Act.

As the Brief for the United States as Amicus (p. 23) points out, the Parent Reimbursement Act has no "divisive political potential since no annual appropriations are involved in it and since it requires no exercise of discretion by state authorities in determining the size of payments to parents".

It is respectfully submitted that, apart from the meager record herein, this Court should summarily reject the Appellees' effort to shut their neighbors out of the public forum by use of the cudgel of "political divisiveness".

Respectfully submitted,

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